

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In Re Applications of

) WT Docket No. 96-41

LIBERTY CABLE CO., INC.

) File Nos.

For Private Operational Fixed
Microwave Service Authorizations and
Modifications

) 708777 (WNTT370)

) 708778, 713296 (WNTM210)

) 708779 (WNTM385)

) 708780 (WNTT555)

New York, New York

) 708781, 709426, 711937 (WNTM212)

) 709332 (NEW)

) 712203 (WNTW782)

) 712218 (WNTY584)

) 712219 (WNTY605)

) 713295 (WNTX889)

) 713300 (NEW)

) 717325 (NEW)

To: Administrative Law Judge Richard L. Sippel

**TIME WARNER CABLE OF NEW YORK CITY, PARAGON CABLE MANHATTAN
AND CABLEVISION OF NEW YORK CITY - PHASE I'S
MEMORANDUM SUPPORTING THE DESIGNATION OF ANTHONY ONTIVEROS
AS A WITNESS FOR HEARING COMMENCING JANUARY 13, 1997**

Time Warner Cable of New York City, Paragon Cable Manhattan and Cablevision of New York City - Phase I (collectively, "TWCNYC") submit this memorandum supporting the designation of Anthony Ontiveros as a "conditional" witness for the hearing commencing January 13, 1997 ("the hearing"), pursuant to Order No. FCC 96M-274 ("the Order"), released December 27, 1996. A document that is central to this case -- and to this hearing -- is the Lehmkuhl Memorandum of February 28, 1995. As the Presiding Judge will recall, this document was produced by Liberty after all the witnesses were deposed. Mr. Ontiveros, who was Behrooz Nourain's supervisor, has never been asked about this document. The

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Lehmkuhl Memorandum and the weekly "Installation Progress Reports," together show Liberty's awareness that it was operating unlicensed microwave facilities well before TWCNYC raised such allegations in early May 1995. The Installation Progress Reports were prepared by Mr. Ontiveros, with Mr. Nourain's assistance. The Reports were then discussed by Liberty's senior management (the Milstein brothers, Peter Price, Mr. Ontiveros and others) at the weekly management meetings. At his re-deposition (following Liberty's belated production of the Lehmkuhl Memorandum), Mr. Price seemed uncertain about the significance of the various entries in the Installation Progress Reports. Mr. Ontiveros, as the author of the Reports and as a participant in the weekly meetings of senior management, will be able to clear up those uncertainties. As Mr. Nourain's supervisor, he also may be able to shed light on what happened to the Lehmkuhl Memorandum.

On December 20, 1996, TWCNYC filed Witness and Exhibit Lists for Hearing Commencing January 13, 1997, which included Mr. Ontiveros as a witness. The Presiding Judge subsequently issued the Order, which stated that TWCNYC's designation of Mr. Ontiveros as a witness was unauthorized, but provided that TWCNYC could file a memorandum and present oral argument regarding the need to call Mr. Ontiveros as a witness.¹ TWCNYC wants the right to call Mr. Ontiveros should other witnesses fail to testify completely about the weekly Installation Progress Reports or suffer a continued lack of recollection about the Lehmkuhl Memorandum.

¹Order, FCC No. 96M-274, WT Docket No. 96-41 (rel. Dec. 27, 1996).

ARGUMENT**I. Mr. Ontiveros' Testimony Is Necessary To Present Highly Relevant Evidence.**

Mr. Ontiveros unquestionably possesses information that is highly relevant to the issues that will be presented at the hearing. In Order No. FCC 96M-265, released December 10, 1996, the Presiding Judge established the parameters for the hearing. The Presiding Judge stated:

it is deemed necessary to make independent findings of credibility and candor with respect to the testimony of Mr. Price, Mr. Nourain, Mr. Lehmkuhl and Mr. Howard Milstein on the factual issue of actual date(s) that knowledge was first obtained by Liberty of the premature activations.²

TWCNYC believes that Mr. Ontiveros has knowledge that will greatly assist the Presiding Judge in resolving the factual issue of when Liberty initially learned that it was illegally operating microwave paths.

A. Mr. Ontiveros Will Provide Testimony Regarding His Knowledge Of The Lehmkuhl Memorandum.

On June 27, 1996, Liberty Cable Co., Inc. ("Liberty") produced a memorandum dated February 24, 1995 ("the Lehmkuhl Memorandum"), to TWCNYC. Michael Lehmkuhl, an attorney at Pepper & Corazzini, Liberty's counsel, authored the memorandum and sent it to Peter Price and Behrooz Nourain. The Lehmkuhl Memorandum notes that Liberty was not operating under any STAs and includes an inventory of Liberty's pending and granted microwave license applications. The Presiding Judge has concluded that the Memorandum contains "operationally significant information" and has demanded testimony

²Order, FCC No. 96M-265, WT Docket No. 96-41, (rel. Dec. 10, 1996), p. 2.

concerning "how such meaningful and reliable information that was paid for and made available to Liberty in February 1995, could have been overlooked or ignored."³

Mr. Ontiveros was deposed prior to Liberty's production of the Lehmkuhl Memorandum, and thus has not provided testimony concerning this significant document. Mr. Ontiveros, the Director of Operations, directly supervised Mr. Nourain and reported to Mr. Price, both of whom were recipients of the Lehmkuhl Memorandum.⁴ Therefore, Mr. Ontiveros will testify about whether Mr. Price or Mr. Nourain discussed the Memorandum with him or forwarded it to him.

TWCNYC believes that Mr. Nourain or Mr. Price shared the Lehmkuhl Memorandum with Mr. Ontiveros. Mr. Price testified that when he received a document like the Lehmkuhl Memorandum, which related to "technical issues and operational issues," his practice was to "almost always" forward it to operations "on the assumption that they may or may not have gotten a copy"⁵ Also, at Mr. Ontiveros' deposition, in response to a question regarding whether he learned when licenses actually had been granted during the period of 1993 through the latter part of 1995, Mr. Ontiveros testified: "I think -- I know that I saw things, paperwork, because of what had happened, but I don't remember exactly -- was more interested in the present going forward."⁶ Mr. Ontiveros needs to be

³Id. at 3.

⁴Ontiveros Deposition, May 21, 1996, pp. 7-9, 27.

⁵Price Deposition, August 1, 1996, pp. 137-38.

⁶Ontiveros Deposition, May 21, 1996, p. 21.

examined about whether he received the Lehmkuhl Memorandum from Mr. Price and whether the "paperwork" to which he referred was the Lehmkuhl Memorandum.

In addition, Mr. Ontiveros' testimony regarding the Lehmkuhl Memorandum is necessary because Mr. Ontiveros' knowledge of this document would have alerted him to any illegal activations. Mr. Ontiveros knew that microwave services had to be licensed by the FCC.⁷ Furthermore, Mr. Ontiveros attended weekly meetings with Mr. Price, during which he reported on the progress of when particular facilities were activated.⁸ Therefore, whether Mr. Ontiveros was aware of the Lehmkuhl Memorandum, a document which reported on the status of license applications, when he discussed the progress of activations at the weekly meetings, is directly relevant to the question of when Liberty first learned of its illegal operations.

B. Mr. Ontiveros Will Provide Testimony Regarding The Purpose And Meaning Of Weekly Installation Progress Reports.

Mr. Ontiveros generated and reviewed weekly technical operations and installation progress reports,⁹ which appear to indicate whether installation at a particular site is complete. Mr. Nourain provided microwave information to Mr. Ontiveros for the reports.¹⁰ Mr. Ontiveros presented these reports at weekly staff meetings, during which he reported the progress of installing and activating facilities. The attendees at these meetings

⁷Id. at 10-11, 21.

⁸Id. at 70.

⁹Id. at 84; Nourain Deposition, May 29, 1996, p. 61.

¹⁰Nourain Deposition, August 1, 1996, p. 54.

included Mr. Price, Mr. Edward Milstein, and Mr. Howard Milstein.¹¹ According to Mr. Price, the reports were used in part "to coordinate the marketing with the installation procedure and to coordinate any licensing that was required in order to move from contract to installation."¹² Mr. Price further testified that if someone reviewed the reports in conjunction with the Lehmkuhl Memorandum, "they could have reached the conclusion that there might be some problem or reconciliation required between these two things."¹³

At his deposition, Mr. Price was questioned extensively about the reports. However, he was unable to confidently and thoroughly define the meaning of terms in the reports. When asked about the meaning of "start" and "end" dates, Mr. Price provided his understanding of the terms, but admitted that he was "not intimate with the jargon of the operations staff"¹⁴ Mr. Price was also unable to explain the significance of addresses and the precise meaning of the term "complete" in the reports.¹⁵

As both an author and presenter of the reports, Mr. Ontiveros is the most competent person available to testify about the purpose and meaning of the reports. Mr. Ontiveros' testimony is necessary to clearly and completely understand the development and utilization of the reports by Liberty, especially in relation to the illegal microwave activations by

¹¹Ontiveros Deposition, May 21, 1996, pp. 69-71, 87.

¹²Price Deposition, May 28, 1996, p. 66.

¹³Price Deposition, August 1, 1996, pp. 174-78.

¹⁴Id. at 168-69.

¹⁵Id. at 169-70, 179-80.

Liberty. In addition, as an attendee at the weekly staff meetings, Mr. Ontiveros will testify regarding the Milsteins' and Mr. Price's understanding of the reports.

CONCLUSION

For the foregoing reasons, TWCNYC respectfully requests that the Presiding Judge permit Mr. Ontiveros to be designated as a witness in the hearing commencing January 13, 1997.

Respectfully submitted,

Christopher A. Holt/dam
by consent

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Dated: January 8, 1997

CERTIFICATE OF SERVICE

I, Debra A. McGuire, hereby certify that a copy of the foregoing Memorandum Supporting the Designation of Anthony Ontiveros as a Witness for Hearing Commencing January 13, 1997 was served this 8th day of January, 1997, via facsimile, upon the following:

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